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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 126

CHESAPEAKE & OHIO RAILWAY COMPANY, AND THE ERIE RAILROAD CO.,

*Petitioners,*

*vs.*

LOIS BRAY VERA CRUZ,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## REPLY BRIEF FOR PETITIONERS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

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**No. 1094.**

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CHESAPEAKE & OHIO RAILWAY COMPANY, AND THE ERIE RAILROAD CO.,

*Petitioners,*

*vs.*

LOIS BRAY VERA CRUZ,

*Respondent.*

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## PETITIONERS' REPLY TO RESPONDENT'S BRIEF.

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### The Effect of Respondent's Brief Is to Admit That Certiorari Should Be Granted in This Case.

Rule 19 of this Court indicates that the following are the character of reasons to be considered in determining whether certiorari shall be granted:

1. Where the decision of a Court of Appeals is in conflict with the decision of other Courts of Appeals on the same matter.

2. Where a decision of a Court of Appeals is in conflict with applicable decisions of this Court.

3. Where a decision of a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's general power of supervision.

Petitioners (at page 8 of their petition) contend that the action of the Court of Appeals in directing entry of judgment for Respondent and denying Petitioners a ruling on their timely motion for new trial invokes all three of these reasons for the granting of certiorari here.

Respondent's brief *admits* that grounds 1 and 2, at least, exist. On page 10 of its brief, Respondent says:

> "In the other Court of Appeals and District Court cases, Respondent submits those courts *did not follow the Montgomery Ward case* nor was the issue of waiver, abandonment and failure to cross-appeal decided." (Our emphasis.)

Here is an assertion by Respondent that the cases cited and discussed by Petitioners from the Fourth, Fifth, Sixth, District of Columbia, as well as earlier cases from the Seventh Circuit "did *not* follow the *Montgomery Ward* case" whereas Petitioners assert that they *did*. On this statement alone Respondent has conceded a conflict of decisions and that reasons for a writ of certiorari exist. The uncertainties created by the decision in the case at bar as opposed to the decisions from other Courts of Appeals (*all professing to construe Montgomery Ward & Co.* v. *Duncan*) make it vital that certiorari be granted so that attorneys relying on these decisions, be advised.

Furthermore, Respondent, at page 9 of its brief, says:

> "The decision of the Court of Appeals for the Seventh Circuit in this case at bar *follows* the *Montgomery Ward* case * * *" (Our emphasis.)

whereas Petitioners contend that it *departs* from *Montgomery Ward*. Here again is an admitted conflict as to the true meaning of *Montgomery Ward*. If opposing counsel each draw diametrically opposite conclusions from the *same case* it would seem that only certiorari can provide the correct answer.

We again point out that such a conflict of construction was the very reason for the original grant of certiorari in *Montgomery Ward*. At page 247 of that case this Court stated:

> "The importance of a decision by this Court *respecting the proper practice under Rule 50(b)* and a *conflict of decisions* moved us to *grant certiorari*." (Our emphasis.)

The opinion of the Court of Appeals for the Seventh Circuit, in the case at bar bypasses this proper practice under Rule 50(b) by resort to an erroneous concept of *Montgomery Ward*. Hence certiorari and further elaboration of that case is here necessary.

## Petitioners' Cited Cases Did Consider and Did Decide That There Was No Waiver or Abandonment.

Respondent, while stating (page 10) that the cases cited by Petitioners are *contrary* to *Montgomery Ward*, nevertheless attempts to distinguish them from the Seventh Circuit case at bar by saying that they did *not* decide the issue of waiver or abandonment. This is simply not true. In the following cases waiver and or abandonment of the motion for new trial *was* decided and was decided *against* this fictional theory:

> "We are, however, unable to spell out any such election or withdrawal."
>
> *Montgomery Ward & Co.* v. *Duncan* (1940), 311 U. S. 243, 249, 85 L. ed. 147, 61 Sup. Ct. 189.

The motion for new trial had *not* automatically "passed out of the case".

> *Casper* v. *Barber & Ross Company* (D. C. 1961), 288 Fed. 2d 379, 383.

Failure to rule on a motion for new trial "does not bar further consideration of such motion".

*Atkins* v. *Halliburton Oil Well Cementing Company, et al* (5 Cir. 1952), 196 Fed. 2d 876, 878.

Where the court below took no action on the alternative motion for new trial, "it stands undisposed of".

*Banks* v. *Associated Indemnity Corporation, et al* (5 Cir. 1947), 161 Fed. 2d 305, 314.

"New trials are not abridged or disfavored by the new rules."

*Pruitt, et al* v. *Hardware Dealers Mutual Fire Insurance Co., Stevens Point, Wisconsin* (5 Cir. 1940), 112 Fed. 2d 140, 143.

If, as Respondent states, these cases are contrary to *Montgomery Ward*, then once again there is reason for the granting of the writ.

## There Was No Abandonment or Opportunity for Cross-Appeal.

Respondent has asserted several times (pages 9, 11) that the Court of Appeals for the Seventh Circuit *found* that there was waiver and or abandonment of the motion for new trial. Respondent takes too much liberty with that Court's opinion. Following is the Court's language:

> "On this record the District Court might with justification have assumed that Appellees had abandoned the motion." (Appendix P. 7a.)

By what logic or mental process can Respondent twist this statement into a "finding" of abandonment by the Court of Appeals? Nor did the District Court "find" abandonment. There is nothing in the record of this case to indicate that the District Court *even contemplated* that Pe-

titioners had abandoned the motion. The record is all to the contrary. No one knows why Judge Swygert failed to rule on the motion for new trial, but it is likely that in the excitement and press of business surrounding his elevation to the Court of Appeals the following day, he merely overlooked it. However, in view of the conceded facts that Petitioners filed it, briefed it, and only seven days earlier had argued it to him at length (Appendix P. 10a), *it can in no event be said that they abandoned it.*

Respondent has likewise taken further liberties with the Court of Appeals' opinion by asserting (P. 11) that the Court "also found" that Petitioners failed to raise the matter of the motion for new trial by cross-appeal. We submit categorically that the opinion of the Court of Appeals does not even mention the matter of cross-appeal. Further, Petitioners were in no position to preserve errors by way of cross-appeal until their motion for new trial was *adversely* ruled upon.

The suggestion of Respondent that the remaining District Court Judge (Grant) could have ruled on the motion is unrealistic because it is conceded (Respondent's Brief P. 4) that the transcript of testimony and proceedings, including the trial court's instructions and comments, were not written up by the court reporter until almost four months after the date of the judgment n.o.v. Immediately upon receiving this transcript Respondents filed it in the Court of Appeals on February 2, 1961. In the interim period between judgment n.o.v. and completion of the transcript of evidence and proceedings Judge Grant (a complete stranger to the evidence and trial proceedings) could hardly have made an intelligent ruling on the motion for new trial.

Likewise the suggestion of Respondent that Petitioners should have asked the Court of Appeals to confer with the newly elevated Circuit Court Judge Swygert and then rule

on the motion is easy to make in retrospect, but it is likewise unrealistic. Furthermore, there is no legal authority which would enable a Court of Appeals to grant or deny a motion for new trial.

## CONCLUSION.

This case is before this Court only because of a unique series of events, most of which occurred outside the courtroom and over which Petitioners had no responsibility or control. A District Court Trial judge is elevated to the Circuit Court of Appeals. Among the many matters to be disposed of before he leaves is Petitioners' motion for judgment n.o.v. and motion for new trial in the alternative. In the rush of clean-up he was obliged to cut oral argument short (Appendix, P. 10a). Thereafter he had left but four days in which to write an opinion and to take care of the myriad of other judicial and administrative matters which were undoubtedly crowding upon his time and thinking. In a well written opinion granting Petitioners judgment n.o.v. (Appendix, P. 1a) he *overlooked* disposing of the motion for new trial in the alternative. Petitioners' substantial legal rights raised by that motion were thus bypassed *under circumstances over which they had no control.* Upon receiving the opinion by mail Petitioners *immediately* attempted to correct the omission but the Judge had permanently left the jurisdiction. The Court of Appeals, in reversing the judgment n.o.v., is also attempting to put an end to the entire litigation by final judgment. *But this shortcut punishes innocent litigants by depriving Petitioners of vital legal rights timely raised and vigorously pursued.* No amount of legal sophistry can justify this deprivation of due process to Petitioners who were in no way responsible for the unusual chain of events above re-

lated. It is left for this Court to give Petitioners their full day in court. It is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated June 14, 1963.

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